

Essex Telcom, Inc.

September 6, 2001

BEFORE THE ILLINOIS COMMERCE COMMISSION

COMPLAINT AND REQUEST FOR	§	
DISPUTE RESOLUTION	§	
OF ESSEX TELCOM INC.	§	DOCKET NO. 01-0427
AGAINST GALLATIN RIVER	§	
COMMUNICATIONS, L.L.C.	§	

INITIAL POST-HEARING BRIEF OF ESSEX TELCOM, INC.

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NOW COMES ESSEX TELCOM, INC. (“Essex”), submits this Initial Post-Hearing Brief in the above captioned matter and states the following:

I. INTRODUCTION AND SUMMARY OF ARGUMENT

A. This is not an ISP-Reciprocal Compensation case; it is a “reverse reciprocal compensation” case.

Prior to a discussion of the issues, it is important to understand that this case *does not* involve a CLEC plea for reciprocal compensation for transport and termination of individual calls to the CLEC’s ISP customers. While there is no doubt that Gallatin users will dial numbers associated with one or more ISPs served by Essex, Essex *is not* claiming that Gallatin should pay Essex reciprocal compensation for those calls. Essex suggested “bill and keep” to Gallatin in their initial negotiations for an Interconnection Agreement (“IA”).¹ In any event, traffic exchange between Gallatin and Essex did not begin until after the effective date of the FCC’s *ISP Remand Order*, and therefore the compensation regime for transport and termination of “ISP-bound” calls is “bill and keep” as a result of the FCC order. The Illinois Commission has ruled that reciprocal

¹ Hearing Transcript (“Hng. Tr.”) p. 59, lines 2-3

compensation does not apply for FX-type² traffic. The compensation regime is “bill and keep.”

This case has two basic issues:

✍ The “FX-type” or “Virtual NXX” issue, which involves provision of telephone exchange service in an exchange area or rate center where the customer is not physically located in that geographic area. This is done by associating an NXX code with the rate center where the “open end”³ will be, and then delivering the traffic to the customer.⁴ The FX-type issue pertains to Essex’ service throughout Gallatin’s territory, including Dixon.⁵ Gallatin is demanding that Essex pay intrastate switched access on all incoming and outgoing FX-type usage.

✍ The “remote IP” issue, which pertains to services to customers that are both physically located in the same rate center, but the “point of interconnection” (“IP” or “POI”) where the two carriers physically interconnect to exchange traffic is not in the same rate center as the two customers.⁶ The remote IP issue pertains to all of Gallatin’s territory except Dixon. Dixon is not involved because the current POI is in Dixon. Gallatin is demanding “reverse reciprocal compensation” for calls from Gallatin users to Essex users.

² Gallatin calls Essex’ arrangement “Virtual NXX”; the Commission, however, has already used “FX” or “FX-like” to describe the service delivery method. Essex will use the Commission’s moniker.

³ The “open end” is the exchange in which the customer has local calling. *See*, Essex Exh. 3, Gallatin Response to Data Request No. 3.

⁴ Hng. Tr. p. 93, lines 7-12.

⁵ Hng. Tr. p. 172, lines 5-10.

⁶ Hng. Tr. p. 92, lines 7-15.

The Commission has already resolved both of these issues and should reach the same results in this case. Neither of Gallatin's demands should be fulfilled.

B. Gallatin is attempting to access charges on Essex for "FX-type" calls that originate or terminate in Gallatin territory. (FX-type issue)

Gallatin seeks to require Essex to pay Gallatin intrastate access charges when a Gallatin user calls an Essex customer that is not physically located in the same rate center or local calling area as the calling party, but has an FX-type number that has been associated with the same rate center as the calling party. Gallatin asserts it can even impose intrastate access charges when the FX-type customer is an ISP, in direct contradiction of the FCC's holding that "Internet-bound calls" are interstate information access subject to § 201 of the Communications Act, over which the states have no authority.⁷ Gallatin also seeks to apply access charges when Essex' FX-type customer calls a Gallatin customer in the same rate center. In other words, Gallatin is attempting to impose non cost-based access rates on all FX-type calls, regardless of direction or jurisdiction. This Commission has already rejected similar attempts by Ameritech, and Gallatin's latest effort must be rebuffed as well.

C. Gallatin is unreasonably attempting to shift transport cost responsibility for "pure local" traffic that originates and terminates in a local calling area that does not contain a Point of Interconnection. ("Remote IP" issue)

The second issue in the case is which party – Gallatin or Essex – bears cost responsibility for delivering calls to and from a local calling area that does not contain a point of interconnection. Gallatin asserts that it should not bear the costs of switching or

⁷ See, *In the Matter of Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68, Order on Remand and Report and Order, FCC 01-131 (rel. Apr. 27, 2001) ("*ISP Remand Order*"). Essex believes that the *ISP Remand Order* is erroneous in many respects. It is, however, in effect until reversed on appeal or changed by the FCC.

transport to and from the POI when a Gallatin customer calls an Essex customer. Gallatin refuses to recognize that the “rules of the road make clear that the originating carrier is responsible for delivering the call to the network of the co-carrier who will terminate the call.”⁸

Gallatin devised an interesting new form of “reverse reciprocal compensation” to obtain the revenue it desires.⁹ The Interconnection Agreement does not allow these charges. Gallatin’s argument that Essex “must bear the economic consequences of its choice” to locate the POI in Dixon has been rejected by the Commission in other cases. Essex has no real choice as to where to interconnect, given Gallatin’s network configuration. Any other location would be inefficient, costly and impractical for both parties. Gallatin’s bald attempt to shift cost responsibility is inconsistent with the IA, FCC rules and this Commission’s prior decisions on this issue.

D. Gallatin is discriminating and committing anticompetitive and illegal acts.

Gallatin is erecting an economic barrier to competitive entry. In addition, Gallatin is engaging in discrimination in comparison to the way it treats its affiliated ISP, which receives FX-like service from Gallatin outside of the tariff regime. The ICC cannot allow Gallatin to limit competition for telecommunications service and information service and Gallatin must be required to follow the tariffing rules.

⁸ Docket 000-332, *Level 3 Communications, Inc. Petition for Arbitration Pursuant to Section 252 (b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Illinois Bell Telephone Company d/b/a Ameritech Illinois*, Arbitration Award, p. 9, citing *TSR Wireless v. USWest*, Memorandum Opinion and Order, FCC 00-194 (Jun. 21, 2000). Both the ICC and the FCC were interpreting 47 C.F.R. §§ 51.703(b) and 51.709(b).

⁹ Gallatin acknowledges this is not a cost issue, but is instead related to a desire to obtain revenues. Hng. Tr. pp. 124, line17-126, line 19.

II. PROCEDURAL HISTORY

Essex is a competitive local exchange carrier authorized by the Illinois Commission to provide telecommunications services within the state.¹⁰ Essex and Gallatin entered a voluntarily negotiated interconnection agreement, which the Commission approved on March 29, 2000 in Docket 01-172.¹¹

Essex has been attempting to implement the agreement by establishing physical interconnection with Gallatin. Even though Gallatin learned during the parties' initial pre-agreement discussions that Essex would be providing service to, among other customers, an affiliated ISP and would be using an FX-type arrangement to do so, Gallatin waited over a year – until April 18, 2001, after Essex requested that interconnection trunks be established – to disclose Gallatin's position that "the traffic for which you (Essex) are requesting trunking is not covered by the Interconnection Agreement".¹² Gallatin rejected Essex' request for interconnection trunks and therefore refused to interconnect with Essex. Essex replied to Gallatin and explained that the agreement did cover this arrangement and demonstrated that Essex fully intended (and now does¹³) provide telecommunications services to entities other than the affiliated ISP.¹⁴

Gallatin ultimately provisioned some of the trunks, but still refused to exchange traffic to and from any town except Dixon unless Essex agreed to pay Gallatin the

¹⁰ Essex Telcom, Inc. (98-0890); Facilities Based & Resale – Statewide, Order, March 24, 1999.

¹¹ The Agreement is an attachment to Essex Exh. 1 (Wolens Direct).

¹² See, Exhibit "A" to Essex' Amended Complaint (April 18, 2001 letter from Gallatin to Essex).

¹³ Hng. Tr. p. 43, lines 2-3; pp. 4-5; p. 52, lines 12-18; pp. 53-57.

¹⁴ See, Exhibit "A" to Essex Amended Complaint (Essex' April 27 letter to Gallatin).

charges in issue.¹⁵ This too was effectively a refusal to interconnect unless Essex waived its rights. Essex filed its complaint and request for emergency relief on June 5, 2001. The parties subsequently agreed to an interim resolution that would allow traffic exchange pending final decision, and Essex withdrew its request for emergency relief via an amended complaint. An evidentiary hearing was conducted on October 31, 2001.

III. ARGUMENT

A. Gallatin is not allowed to recover intrastate switched access for originating or terminating calls to or from Essex FX-type users. (“FX-type” issue)

Gallatin asserts that “virtual NXX” service is “interexchange” and Gallatin may impose intrastate switched access on Essex, when Essex originates a call terminated by Gallatin and when Gallatin originates a call terminated by Essex. Gallatin contends that intrastate switched access applies even when the call is to an Essex ISP customer,¹⁶ despite the FCC’s ruling that “Internet-bound” traffic is interstate and governed by § 201 of the Communications Act.¹⁷

Gallatin is wrong. Access charges do not apply. Instead, bill and keep is the compensation method for “Virtual NXX” or FX-type traffic – for traditional voice calls between two human beings and for “Internet-bound” traffic. This Commission has held that reciprocal compensation does not apply to FX-type traffic. It also ruled that the ILEC cannot charge for transport or switching. Thus, the compensation regime is bill and keep. The FCC has held that bill and keep applies for “Internet-bound” traffic exchanged

¹⁵ See Exhibit A to Essex Amended Complaint (Gallatin May 14 letter to Essex, p. 4) [“Gallatin will not exchange traffic for termination outside of the Dixon local calling area unless it is being appropriately compensated for exchange access.”]

¹⁶ Hng. Tr. pp. 189-190.

¹⁷ *ISP Remand Order* ¶ 39.

between new entrants and ILECs. Gallatin's intrastate access tariff cannot and does not apply to any of this traffic.

1. This Commission has already ruled on the compensation regime for FX-type traffic in the *Focal*, *Level 3* and *Metrocom* cases.¹⁸ In *Level 3* the Commission directly ruled that Level 3 should not be required to compensate Ameritech for switching or transport associated with Level 3's FX-type service. The costs Ameritech was attempting to impose on Level 3 were lower than the non cost-based¹⁹ switched access charges in issue in this proceeding. While the ICC held that reciprocal compensation does not apply because FX is not local,²⁰ it has never allowed the ILEC to assess switching or transport charges. The Commission reaffirmed the *Level 3* holding in the *Metrocom* arbitration. Arbitrators for Texas PUC ruled in the same fashion in a decision released on November 28th.²¹

¹⁸ Docket 00-0027, *Focal Communications Corporation of Illinois Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Illinois Bell Telephone Company, d/b/a Ameritech Illinois*, Arbitration Award, pp. 15-18; Docket 000-332, *Level 3 Communications, Inc. Petition for Arbitration Pursuant to Section 252 (b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Illinois Bell Telephone Company d/b/a Ameritech Illinois*, Arbitration Award, pp. 6-10, 29-31; Docket 01-0338, *TDS Metrocom, Inc. Petition for Arbitration of Interconnection Rates, Terms and Conditions and Related Arrangements with Illinois Bell Telephone Company d/b/a Ameritech Illinois Pursuant To Section 252(b) of the Telecommunications Act of 1996*, Arbitration Award, pp. 45-48.

¹⁹ Mr. Skrivan agreed that Gallatin's switched access rates are not based on TELRIC. Hng. Tr. p. 228, lines 5-7.

²⁰ The Commission referenced a Texas PUC decision (Docket 21982) to the same effect at page 10 of the *Level 3 Award*.

²¹ Docket 24015; *Consolidated Complaints And Requests For Post-Interconnection Dispute Resolution Regarding Inter-Carrier Compensation For "FX-Type" Traffic Against Southwestern Bell Telephone Company*. ("Texas FX Award") [copy contained in Attachment A to this Brief]. The *Texas FX Award* is follow-up proceeding to Docket 21982. Relying in part on this Commission's *Metrocom* award, the Texas FX Arbitrators ruled that "virtual NXX" or "FX-like" services are "telephone exchange service" but not "local" with the result that bill and keep should be the compensation regime for this traffic. The Texas Commission also rejected the ILEC's position that intrastate switched access applies.

FCC ISP Remand Order In the *ISP Remand Order* the FCC removed the reference to “local” in its compensation rules. This rule change is not limited to ISP-bound traffic and affects all traffic potentially subject to § 251(b)(5). As a result, the first level determination is not whether the call “local” but instead whether it is “exchange access” or “information access” under § 251(g). If the call is either exchange access or information access, then § 251(b)(5) reciprocal compensation does not apply because § 201 governs. If the call is neither exchange access nor information access, then the call is potentially, but still not always, subject to reciprocal compensation. There is then a second step after the determination between “access” and “telephone exchange” to see if § 251(b)(5) reciprocal compensation is appropriate.

Texas FX Arbitration The *Texas FX Arbitrators* described the first step to the legal test at page 32 of the *Texas FX Award*:

Specifically, the *ISP Remand Order* clarified that the classification and compensation standard for all telecommunications traffic, including ISP-bound traffic, is to be based upon the interplay between FTA § 251(b)(5) and 251(g). The FCC concluded that all telecommunications traffic is eligible for reciprocal compensation under FTA § 251(b)(5), unless expressly exempted from by § 251(g). FTA § 251(g) expressly exempts exchange access, information access and exchange services for such access from reciprocal compensation. Consequently, under the federal compensation scheme, all telecommunications traffic is classified either:

1. exchange access (including exchange services for such access provided to interexchange carriers);
2. information access (including exchange services for such access provided to information service providers); or
3. not exchange access or information access.

Therefore, exchange access and information access are not eligible for reciprocal compensation, whereas all other telecommunications traffic is eligible for reciprocal compensation.

In the *Texas FX* case, the CLECs sought payment of reciprocal compensation, which the ILEC (SBC) opposed. SBC sought payment of access charges, which the CLECs opposed. The *Texas FX* Arbitrators found that the answer depended on the classification of non-ISP FX-type traffic. They held that this traffic was not exchange access, so access charges do not apply. Where no ISP is involved, the traffic is not information access. The ultimate holding was that non-ISP FX-type traffic is “telephone exchange service” because it is a “comparable service.” *See* 47 U.S.C. § 154(27)(B). *Texas FX Award*, pp. 30-38.

“Virtual NXX” is FX-type and is not comparable to 8YY Gallatin claims that “Virtual NXX” is comparable to “8YY” to support the proposition that access applies. A considerable amount of pre-filed and oral testimony was presented on this subject.²² Mr. Skrivan’s opinion (and his chart), however, was shown in cross-examination to be full of admitted errors.²³ The comparison is simply not apt. The *Texas FX* Arbitrators found that FX-type service is not comparable to 8YY service on both legal and technical grounds.²⁴ Essex agrees. FX-type service – whether provided by an ILEC or CLEC – is

²² *See*, Gallatin Exh. 1 (Skrivan Direct) p. 12; Essex Exh. 2 (Goldstein Rebuttal) pp. 3-5; Gallatin Exh. 3 (Skrivan Surrebuttal) pp. 3-5

²³ Hng. Tr. pp. 131–141.

²⁴ *Texas FX Award*, p. 36-37:

“Likewise, the Arbitrators do not consider FX traffic to be entirely analogous with what SWBT states is a limited form of 8YY service either. FX service does not in and of itself facilitate the provisioning of toll calls beyond the two affected exchange service areas. FX service provides a local connection between the calling party and the called party, one of which is the FX customer. End-users can reach an FX customer without incurring a toll charge only if the end-user’s call originates within the same mandatory local calling area in which the FX customer’s number is assigned. On the other hand, 8YY allows end users to place calls that would otherwise incur toll charges to an 8YY customer from any location outside of the terminating 8YY customer’s mandatory local calling area without incurring such toll charges. This is accomplished by dialing a 1-8YY-XXXX number, which is then routed through a national database that includes information regarding the routing and termination of such calls through an interexchange carrier. As noted above, interexchange carriers are not involved with the origination and termination of FX calls

comparable to “telephone exchange service.”²⁵ The Illinois Commission has already made the connection between “Virtual NXX” and “FX” in the *Focal*, *Level 3* and *Metrocom* arbitrations. Gallatin’s own tariff says that Foreign Exchange service is “Telephone Exchange Service furnished through any Central Office of an Exchange other than the Exchange that regularly serves the area in which the Customer is located.”²⁶

The Commission’s rules treat FX as an exchange service. Section 730.105 of the Commission’s rules states that: “‘Foreign exchange service’ means a classification of exchange services whereby customers may be provided a telecommunications service from a local exchange other than the one from which they would normally be served.” Section 730.715(b) provides an exception to the normal rule relating to local service provision outside an authorized area and expressly allows LECs to provide FX outside of the areas the LEC is otherwise authorized to serve. This rule recognizes the true character of FX as comparable to local exchange service and not interexchange. The exception would not be

within the exchange service area. 8YY service is technically different than FX service and is not reasonable substitute for FX service.” (*sic*)

²⁵ Mr. Skrivan weakly asserted that “Virtual NXX” is not comparable to FX. Gallatin Exh. 3 (Skrivan Surrebuttal), p. 3; Hng. Tr. pp. 128, line 14 to 130, line 21. But Gallatin itself claimed that Essex “Virtual NXX” service was a form of FX. Gallatin Exh. 4, p. 2 (“Essex will be providing a foreign exchange service”). Mr. Skrivan himself called it FX during the hearing. Hng. Tr. p. 150, line 15. Gallatin cannot even decide whether it is providing “Virtual NXX” service to Essex. *Compare* Hng. Tr. p. 130, lines 3-8 to pp. 148, line 20 to 149, line 15. Essex does not believe Gallatin is providing any such service. The parties do provide transport and termination to each other under either § 201 or § 251. But interconnection is not a service; it is a meeting of peers so as to be in position to exchange telecommunications traffic. Hng. Tr. pp. 142-145. FCC rule 47 C.F.R. 51.5 defines Interconnection as “the linking of two networks for the mutual exchange of traffic. This term does not include the transport and termination of traffic.” *See also, Local Competition Order*, ¶ 176. The point is that Gallatin’s position is hard to follow because it changes moment by moment.

²⁶ Essex Exh. 9, Gallatin General Customer Services Tariff, Sheet 7 (emphasis added). Note the similarity to the Southwestern Bell Texas tariff definition the Texas Arbitrators relied on in part to find that FX is telephone exchange service and not exchange access. *Texas FX Award*, p. 33.

necessary if FX were interexchange since incumbent LECs have separate interexchange authority.²⁷

PUA § 13-405 advises the Commission to grant a “Certificate of Exchange Service Authority,” which implies that carriers with this certificate have the lawful right to provide “exchange service.” To provide “interexchange service” a carrier uses a different process.²⁸ FX is comparable to exchange service and is not interexchange service under the Illinois Act and Commission rules, and therefore meets the definition of “telephone exchange service” in the Communications Act rather than “telephone toll” or “exchange access.”²⁹

Regulators have held that some telephone exchange services can be subject to bill and keep. A determination that traffic is telephone exchange service does not automatically and necessarily result in reciprocal compensation payments under the Texas and Illinois decisions. After a review of the authorities and precedent, the *Texas FX Arbitrators* found that bill and keep is the appropriate compensation regime for FX-type traffic.³⁰ This decision is entirely consistent with the Illinois Commission’s holding in *Level 3* that FX is not subject to reciprocal compensation and the ILEC is not entitled to be paid for switching and transport on its side of the IP.³¹ Essex has urged this result from the beginning of the parties’ negotiations.

²⁷ Hng. Tr. p. 133, lines 19-21; pp. 225, line 12 – 226, line 1.

²⁸ “Interexchange telecommunications service” is defined in § 13-205 of the PUA. The process for interexchange service authority is covered in 13-403.

²⁹ Despite Mr. Skrivan’s denial at page 7 of his Surrebuttal (Gallatin Exh. 3), FCC rules assign FX service open end costs and revenues to the local jurisdiction. *Texas FX Award*, p. 25.

³⁰ *Texas FX Award*, pp. 48-57.

³¹ *Level 3 Award*, p. 9. “[T]he originating carrier is responsible for the cost of delivering the call to the network of the carrier who will terminate the call.”

2. The result is the same for “Internet-bound” calls. The *ISP Remand Order* determined that the compensation for jointly provided calls to ISPs when a CLEC enters a market after the effective date of the *Order* is bill and keep.³² The FCC also directly held that this traffic is interstate in nature and therefore subject to § 201 of the Act.³³ Because of this, the *Texas FX* Arbitrators ruled that “all ISP-bound traffic, whether provisioned via an FX/FX-type arrangement or not, is subject to the compensation mechanism contained in the FCC’s *ISP Remand Order*.”³⁴

Gallatin’s claim that it is entitled to intrastate switched access even when an ISP is involved is based on two legal theories that have both been rejected by the FCC. In the first theory, Gallatin focuses on the physical location of the ISP. If the ISP is not physically located in the same exchange as the calling party, then the call is allegedly not local. Under the FCC’s end-to-end theory, however, the physical location of the ISP is irrelevant. The relevant end point is “the global computer network of web content, email authors, game room participants, databases or bulletin board contributors.” *ISP Remand Order* ¶ 59. The ISP is now merely “an intermediate point of switching or exchange between carriers (or other providers),” *Id.* ¶ 57, and the physical location of the ISP is irrelevant for jurisdictional purposes.

Gallatin’s second legal theory is a mere recast of the “two-call” theory. Under Gallatin’s approach, the portion of the call that is intrastate is the portion from end user to

³² *ISP Remand Order* ¶ 81.

³³ *ISP Remand Order* ¶¶ 52-65.

³⁴ *Texas FX Award* at 30-31.

ISP.³⁵ Right or wrong, the FCC has rejected the “two-call” theory as it pertains to LEC joint provision of information access.³⁶ The entire arrangement is “one call” and it is interstate “information access” according to the FCC. Gallatin may not impose intrastate switched access on Essex when Gallatin and Essex jointly provide interstate information access.

3. Gallatin’s intrastate access tariff cannot and does not apply. Gallatin’s attempt to apply its intrastate access tariff is irrational, unworkable and contrary to Illinois law since it would allow Gallatin to apply, not apply or waive access tariff provisions at its whim.

Gallatin asserts that the access tariff terms will prevail to the extent there is a conflict between the Agreement and the tariff. When pressed with specifics, however, Mr. Skrivan was equivocal and uncertain.³⁷ He responded at times that he needed to further investigate the particular issue and obtain legal advice.³⁸

There is a much bigger problem. Mr. Skrivan could not really tell the Arbitrator the type of access service that Essex is allegedly obtaining from Gallatin. According to Mr. Skrivan, the “closest match” is “Feature Group A.” He is only generally familiar with the technical specifications of that arrangement, however.³⁹ Unfortunately for Mr. Skrivan, Essex and Gallatin are interconnected on the trunk side, whereas Feature Group

³⁵ See Hng. Tr. pp. 189, line 8 to 190, line 160. Essex believes that calls to ISPs can be local and intrastate and the FCC’s ruling is incorrect as a matter of law and policy. Intrastate access, however, still would not apply in the FX-type scenario even if the FCC had not assumed exclusive jurisdiction over “Internet-bound” traffic. In that event, calls to ISPs would be treated like all other calls and in Illinois, access does not apply to inter-carrier FX-type traffic, as shown above. The FCC has ruled, however, and that decision stands absent change on appeal.

³⁶ *ISP Remand Order* ¶ 62.

³⁷ Hng. Tr. pp. 172-214.

³⁸ Hng. Tr. pp. 179-181; pp. 197, line 18 – p. 198, line 2.

³⁹ Hng. Tr. p. 183, lines 2-17; p. 215; p. 207.

A is a line side connection. Feature Group A does not provide answer supervision, calling party number or a host of other features that are in fact in place under the interconnection arrangement between the parties.⁴⁰ Mr. Skrivan ultimately abandoned Feature Group A and thought that Essex might instead be receiving Feature Group B.⁴¹ He admitted that amendments to the tariff (or informal arrangements) might be needed.⁴² On two occasions, he offered to “waive” a tariff provision.⁴³

Mr. Skrivan stipulated that “Virtual NXX is not precisely like Feature Group A, B, C or D.”⁴⁴ Those are the only four services listed in the switched access tariff, and the rules, regulations and specifications for each are different.⁴⁵ In other words, the access tariff does not define or include the technical specifications, terms or conditions for the “access service” that Gallatin is allegedly providing to Essex, but which Gallatin insists is governed by the tariff. If Gallatin is correct that the access tariff applies, then Gallatin appears to be violating 745.20(a) of the Commission Rules⁴⁶ and PUA § 13-505.4.

⁴⁰ Hng. Tr. p. 176, line 20; p. 183, lines 18-10; pp. 207-208; p. 214, lines 8-11; *See, Local Competition Order* note 2091; <http://www.swbell.com/About/Lingo/0,1274,EH,00.html> (Note: see also the definition of “FX”); <http://www.swbell.com/About/Lingo/0,1274,IL,00.html> (definition of line side connection); http://www.gt-er.cg.org.br/voz/long_distance/chapt2.pdf p. 2-7. A carrier does not have interconnection trunks like those that exist between Essex and Gallatin if it is on the line side of the end office switch. Feature Group A connects the IXC to the line side of the switch.

⁴¹ Hng. Tr. p. 208, lines 7-8.

⁴² Hng. Tr., p. 195, line 8; p. 197, line 9; p. 226, lines 12-22.

⁴³ Hng. Tr. p. 198, lines 12-19; p. 205, lines 1-15. He finally recognized that “tariff waiver” might be a problem absent Commission approval.

⁴⁴ Hng. Tr. p. 208, lines 12-14. *See also*, Hng. Tr. 183, lines 4-6 (agrees there is “not an exact match”).

⁴⁵ Hng. Tr. p. 184, lines 14-17.

⁴⁶ 745.20 provides:

a) No telecommunications carrier shall offer or provide telecommunications service unless and until a tariff is filed with the commission which complies with this part

Mr. Skrivan was also very tentative and unclear as to which specific access rates and rate elements would apply.⁴⁷ Although he asserts Gallatin has “figured out a way to make it all work”⁴⁸ Mr. Skrivan simply could not demonstrate such figuring or its logic. His answers were so equivocal and his explanations so inconsistent and variable that it is plain Gallatin has no idea what “access service” it is purportedly providing to Essex or what the prices, terms or conditions will be.

B. Gallatin cannot shift cost responsibility to Essex. (Remote IP issue)

Gallatin claims that it should be allowed to charge Essex for the cost to deliver traffic to the interconnection point (“IP” or “POI”) between the parties’ networks.⁴⁹ The Agreement, however, requires each party to bear the cost of transport on its side of the POI, and does not allow Gallatin to shift these costs to Essex.⁵⁰ FCC rules 47 C.F.R. §§ 51.703(b) and 51.709(b) require this result, as this Commission recognized in *Level 3*. Mr. Skrivan largely admitted the general rule, but resisted its application in this case.⁵¹

and which describes the nature of the service, applicable rates and other charges, terms and conditions of service, and the exchange, exchanges or other geographical area or areas in which the service shall be offered or provided (Section 13-501 of the act).

b) All tariffs shall state whether the service to be provided is an interexchange telecommunications service, a local exchange telecommunications service, neither or both.

As a side note, Essex could not locate a statement in the access tariff whether the services in the tariff are competitive on non competitive as required by Rule 745.30.

⁴⁷ Hng. Tr. pp. 152-153; 173-178; 213.

⁴⁸ Hng. Tr. p. 185, lines 15-21.

⁴⁹ The exact charges Gallatin intends to assess are unclear, since Gallatin gave various and conflicting explanations. Hng. Tr. p. 96, lines 12-22; p. 97, lines 10-13 and p. 98, lines 5-11. Mr. Skrivan at one point recognized he was answering the question “several different ways.” Hng. Tr. p. 103, lines 13-14.

⁵⁰ Mr. Skrivan certainly could not find any contract terms that authorized these charges. Hng. Tr. p. 112, lines 2-10; p. 114, line 14-15.

⁵¹ Hng. Tr. p. 154.

The contract requires each party to bear the cost of transport on that party's side of the POI. The contract also specifies where POIs can exist. The relevant contract terms are 1.2.1, 1.2.2 and 3.1.4:

1.2.1 "Interconnection Point" or "IP" means the physical point that establishes the technical interface, the test point, and the operational responsibility hand-off between CLEC and Gallatin for the local interconnection of their networks.

1.2.2 CLEC will be responsible for engineering and maintaining its network on its side of the IP. Gallatin will be responsible for engineering and maintaining its network on its side of the IP. If and when the parties choose to interconnect at a mid-span meet, CLEC and Gallatin will jointly provision the facilities that connect the two networks. Gallatin will be required to provide fifty (50) percent of the facilities or to its exchange boundary, whichever is less. CLEC will be required to provide fifty (50) percent of the facilities or to Gallatin's exchange boundary, whichever is greater.

3.1.4 Trunking can be established to tandems or end offices or a combination of both via two-way trunks. Trunking will be at the DS-0 level, DS-1 level, DS-3/OC-3 level, or higher, as agreed upon by CLEC and Gallatin. Initial trunking will be established between the CLEC switching centers and Gallatin's access tandem(s). The Parties may utilize direct end office trunking depending upon tandem exhaust, traffic volumes, or by mutual agreement.

The POI between Essex and Gallatin is located at the Dixon tandem. This is the preferred location in the agreement absent circumstances that Gallatin admits have not been met,⁵² and is the most efficient for all concerned since Gallatin's Dixon office acts not only as the tandem, but also as the host for all of Gallatin's other end office switches, all of which are Nortel RSCs.⁵³

⁵² Gallatin's Answer to Essex Amended Complaint, ¶ 20.

⁵³ Hng. Tr. p. 155, line 18. The typical RSC contains 20 DS1 trunk ports to connect to the host switch. See, http://www.nortelnetworks.com/products/01/dms100/remotes/remote_ds1s.html. Mr. Skrivan essentially admitted that having the POI at the tandem is the most efficient location. Hng. Tr. p. 162, lines 4-12.

Gallatin argues that Essex must bear the economic consequence of its “choice” to have a single POI at Gallatin’s tandem rather than an IP at each of Gallatin’s end offices.⁵⁴ The problem is that (1) Essex does not in fact have a “choice” to establish an IP in each end office and (2) having an IP at every end office is not efficient for either party. Gallatin merely wants to shift cost responsibility to Essex. Gallatin failed to show that establishing an IP at each of the remotes is technically feasible.⁵⁵ The evidence, however, definitely indicates that doing so would cost both parties more than the current arrangement, and would be inefficient from an engineering perspective. The Commission has emphasized its desire for efficiency in interconnection.⁵⁶ Engineering efficiency supports and advances the statutory goal of “maximum development of competitive telecommunications services offerings” stated in PUA § 13-801(a). Protecting monopoly access revenue streams, on the other hand, is antithetical to the statutory goal.

Establishing an IP at each remote, even if feasible, would waste trunk ports and dedicated transport. The interconnection would have to be at the DS1 level, but there is no evidence there is anything close to a DS1’s (24 simultaneous call paths) worth of traffic from any of these remote offices. The dedicated port and transport facility would

⁵⁴ Hng. Tr. p. 153, lines 9-15. He later testified he was not really suggesting that Essex should establish an IP at each remote. Hng. Tr. p. 164, lines 10-11; p. 224, lines 15-22. It is therefore quite clear that Gallatin merely wants to shift costs to Essex.

⁵⁵ Mr. Skrivan believed an IP could be established at the remotes. Hng. Tr. p. 50, line 19; p. 154, lines 18-21. The access tariff, however, provides at least some evidence that direct connection at the remotes is not feasible. Hng. Tr. p. 163, line 6; p. 164, line 9; pp. 201, line 8 – 202, line 6.

⁵⁶ Level 3 Award, p. 31.

not be available for Gallatin's on-network traffic, and would be only partially used for traffic to and from Essex customers.⁵⁷

When presented with the issue of when an additional POI should be required between Level 3 and Ameritech, the Commission chose OC-12 (8064 simultaneous call paths), which is 336 DS1s.⁵⁸ Essex cannot imagine that there will ever be that much traffic in total from any of these remotes, much less between Essex and Gallatin. Gallatin clearly was not ever seriously suggesting that Essex should establish an IP at every one of these remote switch modules.

In *Focal*, the Commission rejected Ameritech's similar request that Focal be required to establish "geographically relevant interconnection points" and therefore bear additional transport costs, or merely pay for transport. Ameritech claimed it should not bear cost responsibility on its side of the IP. Ameritech asserted that Focal was getting a "free ride."⁵⁹ The Commission stated:

If such a requirement were adopted, Focal could be required to construct or lease interconnection facilities, regardless of whether the interconnection was warranted by overall traffic volumes. Ameritech's proposal is not required by federal or state law. The Commission does not accept the "free ride" argument of Ameritech for the reasons provided by Focal.⁶⁰

⁵⁷ Hng. Tr. p. 163, line 6; pp. 156 – 163; p. 164, line 9; pp. 165-166; pp. 201, line 8 to p. 202, line 6. Given that the access tariff precludes direct connection to a remote, Essex and Gallatin would have to segregate the "FX-type" traffic from the "true local" traffic. This would lead to even further inefficiency and waste.

⁵⁸ *Level 3 Award*, p. 30.

⁵⁹ Mr. Skrivan claimed "free ridership" in his Direct Testimony (Gallatin Exh. 1) at p. 13. Essex will merely refer the Arbitrator to the Focal's reply to this argument (as described on p. 17 of the *Focal Award*) since the Commission expressly agreed with Focal in that case.

⁶⁰ *Focal Award*, p. 18.

As indicated above, the result was the same in *Level 3*. The ILEC must deliver traffic to the POI, which can be anywhere, but preferably is at the tandem. Once an appropriate threshold (OC 12) is reached then a new POI should be established.

The ICC has therefore already addressed this issue. The Commission has expressed a preference for CLECs to interconnect at an ILEC tandem, and this is what Essex has done. The Commission correctly observed in the *Level 3 Award* that “(w)ith a POI installed in a tandem the issue of the cost of regular and virtual NXX number transport all but disappears.”⁶¹ Essex has interconnected at Gallatin’s tandem. There is no cost issue – other than Gallatin’s unreasonable attempt to shift costs to Essex.

C. Gallatin is discriminating and committing anticompetitive and illegal acts.

Gallatin is erecting an economic barrier to competitive entry. In addition, Gallatin is engaging in discrimination in comparison to the way it treats its affiliated ISP, which receives FX-like service from Gallatin outside of the tariff regime. The ICC cannot allow Gallatin to limit competition for telecommunications service and information service and Gallatin must be required to follow the tariffing rules.

Gallatin’s request for access and reverse reciprocal compensation is clearly designed to significantly increase the cost a CLEC will incur to provide competitive telecommunications services in Gallatin’s territory. These charges, if allowed, will present a formidable economic barrier to competitive entry by putting CLECs at a severe cost/price disadvantage. Gallatin may be pleased that it is immune from competition, but the citizens in Gallatin territory will suffer from a distinct lack of competitive choice.

⁶¹ *Level 3 Award* at 30.

The effect of Gallatin's demand was strikingly demonstrated by the revelation that Gallatin calculates that **Essex Telcom** will pay Gallatin four times the amount that **Internet Services of Northern Illinois** (Essex' affiliated ISP) paid Gallatin.⁶² Yet Essex Telcom is interconnecting with Gallatin whereas the affiliated ISP was receiving retail service from Gallatin. Gallatin wants to charge Essex Telcom four times more for "wholesale" than Gallatin charged the ISP for retail. It seems quite clear that Gallatin wants to make sure no upstart CLEC even attempts to provide competitive service to ISPs. This borders on predatory pricing and is anticompetitive and unlawful.

Gallatin also wants to make Essex pay usage-based, above cost switched access for the "FX-type" service Essex will provide to ISPs and other users at the same time that Gallatin charges its retail customer a flat local rate for the open end of the same service. Gallatin indicated during the hearing that it had withdrawn its FX tariff, and it is not possible for an end user to obtain FX service in Gallatin territory.⁶³ Gallatin's affiliated ISP, however, is in fact receiving FX service from Gallatin,⁶⁴ despite Mr. Skrivan's carefully stated seeming denial at pages 18-19 of his Surrebuttal. Gallatin's affiliated ISP is physically located in Dixon, but it has Savannah numbers.⁶⁵

According to Mr. Skrivan, the affiliated ISP obtains DS1 Digital Trunk Service. This may explain the charges for the service in Dixon, but it does not advise the Arbitrator how the traffic between callers in Savannah and Gallatin's affiliated ISP are

⁶² Hng. Tr. p. 169, line 15 – p. 170, line 15.

⁶³ Hng. Tr. p. 169, lines 6-12.

⁶⁴ Essex Exh. 2 (Goldstein Rebuttal), p. 10.

⁶⁵ Essex Exh. 6, Response to Data Requests 14 and 15. Under Gallatin's theory, Gallatin would owe Essex access if one of Essex' users in Savannah with a Savannah number dialed Gallatin Internet's

carried to Dixon. Nor do we know the rates the affiliated ISP pays for the “open end” service in Savannah. Mr. Skrivan appears to answer the first question between page 10, line 340 and page 11, line 249 of his Surrebuttal. Gallatin’s ISP obtains dedicated facilities between the two towns. What we still do not directly know is whether the ISP pays the local rate or a usage rate at the open end. Based on Mr. Skrivan’s testimony on page 10 of his Direct, Essex believes it is fairly apparent that Gallatin’s ISP is *not* paying access or toll, but is instead paying the flat local rate for usage at the open end.

This presents two significant issues. First, Gallatin is obviously engaging in discrimination in an attempt to deny competitive alternatives to ISPs for service. Gallatin will charge an ISP the local rate, and no CLEC can compete with that price if the CLEC must pay access for all the usage to the ISP. Second, Gallatin is providing a non-tariffed service to its affiliated ISP. As far as Essex can determine, now that Gallatin has withdrawn its FX tariff, there is no tariff vehicle for an end user customer (including ISPs, which are treated like end users under the FCC’s “ISP exemption”) to obtain local calling in a distant exchange. The Arbitrator should recommend that the Commission investigate Gallatin’s apparent multiple violations of Rule 745.20 and PUA § 13-505.4 and impose sanctions and penalties if violations indeed exist.

Gallatin’s actions and positions are clearly discriminatory and anticompetitive. Gallatin appears to be in violation of the Commission’s rules and the PUA. This must be stopped or the citizens residing in Gallatin’s territory will not enjoy competitive telecommunications or information services.

Savannah number. No doubt Gallatin would become quite uneasy about this result if the number of such calls became significant.

IV. CONCLUSION

The purpose of recent PUA and 1996 Communications Act revisions was to provide the opportunity for Illinois citizens to have competitive alternatives. The laws and rules were not designed to protect incumbents' market share or revenue streams. Gallatin's actions and positions in this case clearly demonstrate that incumbents in general and Gallatin in particular will try every trick and stretch every concept to deter competition.

Essex Telcom is a new entrant. The principal of the Company is an Illinois entrepreneur trying to bring competitive alternatives to his friends and neighbors. Gallatin will likely make much of the fact that Essex has an affiliated ISP and may even try to "expose" alleged affiliate abuses. Gallatin, however, has significant affiliate problems of its own. In any event, Essex is not a dominant incumbent, while Gallatin is. There is no concern about cross-subsidization, imputation, or anticompetitive acts by Essex, as it clearly lacks market power. Gallatin is certainly doing all it can to ensure that Essex makes no progress toward diminishing Gallatin's dominance. Had Gallatin merely obeyed its contractual duties, Essex would have been able to dedicate resources to providing competitive service rather than paying significant legal fees and suffering through the delays attendant to the normal processing of this proceeding.

The law is clear, the precedent is clear, the interconnection agreement is clear and the evidence is clear. Gallatin cannot assess access charges on the usage associated with Essex' FX-type service. Gallatin is not entitled to "reverse reciprocal compensation" on local calls where there is a "remote IP." Gallatin's anticompetitive and unlawful

practices must stop, and the Commission should investigate the apparent violations of the PUA and Commission rules.

WHEREFORE, PREMISES CONSIDERED Essex Telcom, Inc. respectfully requests that the Arbitrator rule:

- (a) that Essex is not obligated to pay access charges for its FX-type service;
- (b) that Gallatin is responsible for the cost to deliver traffic to the point of interconnection;
- (c) that the evidence in this case indicates possible violations of the Public Utility Act and Commission rules and an investigation should be opened to determine the appropriate sanctions, if any.

Essex also requests that it be granted such other and further relief to which it has shown it is entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing pleading has been served on the following U.S., Mail properly addressed with charges prepaid or payment arrangements made, on this 13th day of December, 2001.

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W. Scott McCollough s